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Supreme Court, U.S.
FILED
MAR 18 1987
JOSEPH F. SPANIOL, JR.
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IN THE
SUPREME COURT OF THE UNITED STATES

_____ Term, 19_____

No._____

ELIZABETH J. HERON,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

STANLEY W. GREENFIELD,
Counsel for Petitioner,
Elizabeth J. Heron

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QUESTION PRESENTED FOR REVIEW

I. Whether the trial court violated the accused's right of due process by admitting evidence of motive in the belief that even absent any proof of actual knowledge "reason and experience" demonstrate that the mere existence of a spousal relationship alone permits the jury to make the inference that a wife knows about the insurance her husband carries?

PARTIES TO THIS PROCEEDING IN THE COURT BELOW

Petitioner's alleged co-conspirator was tried and convicted of first degree murder in the matter of Commonwealth v. Anthony Victor Ferraro at Allegheny County, Pennsylvania, Criminal Control Number CC 8107528AO. Mr. Ferraro did not appeal his conviction nor seek collateral relief.

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OPINIONS BELOW

The Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, entered an Opinion denying Petitioner's post-verdict motions. A copy of that Opinion appears in the Appendix at pp. 28a-63a.

The Superior Court of Pennsylvania, Sitting at Pittsburgh, affirmed the judgment of conviction and sentence imposed thereon in an Order and Opinion issued June 4, 1986. A copy of that Opinion appears in the Appendix at pp. 2a-27a.

The Supreme Court of Pennsylvania entered a "Per Curiam" Order denying Petitioner's Petition for Allowance of Appeal on January 9, 1987. A copy of that Order appears in the Appendix at p. 1a.

STATEMENT OF JURISDICTION

The Judgment and Order of the Supreme Court of Pennsylvania was entered on January 9, 1987. The jurisdiction of the Supreme Court of the United States is invoked under Title 28 United States Code Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The Fourteenth Amendment to the Constitution of the United States provides:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment to the Constitution of the United States provides:

> . . . nor be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Procedural

This petition is before the Court from the denial of Petitioner's Allowance of Appeal by the Pennsylvania Supreme Court on January 9, 1987. Petitioner, Betty Heron, was found guilty after jury trial, and sentenced to life imprisonment after the trial court denied all post-trial motions on September 19, 1984. The Superior Court of Pennsylvania affirmed the findings of the trial court on June 5, 1986. An Application for Reargument was denied by the Superior Court on July 25, 1986 and Petitioner then sought relief in the Pennsylvania Supreme Court.

Background

On August 5, 1981 Anthony Ferraro murdered David Heron. After a trial in March of 1982, Ferraro was convicted of first degree murder. After his own trial, but before sentence, Ferraro

cooperated with authorities and then testified at Mrs. Heron's trial claiming that she had paid him to kill her husband. At the very time of his testimony, Ferraro, who had admitted committing perjury at his own trial, was being treated and medicated for mental illness at Mayview State Hospital.

He testified that Mrs. Heron paid him $2,500.00 in cash prior to the murder, and $900.00 in cash and a $500.00 check after the killing, which, in contradiction, he also admitted in other testimony was for paving Mrs. Heron's driveway. He also contended that the balance of the $5,000.00 contract price was realized through savings from purchasing Mrs. Heron's truck at a reduced price.

Mrs. Heron testified that she was acquainted with Ferraro through her employment. Prior to the killing, she had met Ferraro a total of seven times. The two were never romantically involved

and had not talked at all for over a month prior to the killing. Mrs. Heron denied asking Ferraro to kill her husband, or paying him to do so. She testified that the only money she ever paid him was a $500.00 check for the repair of her driveway. Ferraro was supposed to give the check to a construction company, but failed to do so and kept the money for himself.

At the time of the murder, Mr. and Mrs. Heron were in the process of obtaining a divorce, originally filed by Mrs. Heron and were negotiating a settlement proposal from Mr. Heron.

As evidence of motive at her trial, the Prosecution was allowed to introduce the payment[1]

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1. Petitioner objected to the introduction of this evidence at trial on due process grounds (T.T. 303-315). Petition renewed the objection in her Post-Trial Motions, and before the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania the trial court's opinion dealt with this issue at pages 45a-46a. The Superior Court's Opinion deals with this issue at pages 13a-14a.

to Mrs. Heron of the proceeds of a life insurance policy on the life of her deceased husband. Petitioner argued unsuccessfully that the evidence was admissible only if the state first proved that she knew of the existence of the policy prior to the murder.

After the admission of this evidence, and as evidence of her lack of knowledge of the existence of the policy prior to the murder Mrs. Heron testified that when she consulted her attorney, regarding the settlement of her late husband's estate, she did not know if her husband had life insurance. At the same time, that attorney testified that Mrs. Heron "did not seem to have a very good handle on what her husband had", from which he formed the impression "that the Herons had not really been close for a couple of years".

She also introduced evidence that at the very time of his death, David Heron had an insurance

policy payable to his first wife, and that he had joint bank accounts with his children by his first marriage.

REASON RELIED UPON FOR THE ALLOWANCE OF THE WRIT

THE TRIAL COURT VIOLATED THE ACCUSED'S RIGHT TO DUE PROCESS BY ADMITTING EVIDENCE OF MOTIVE IN THE BELIEF THAT EVEN ABSENT ANY PROOF OF ACTUAL KNOWLEDGE "REASON AND EXPERIENCE" DEMONSTRATE THAT THE MERE EXISTENCE OF A SPOUSAL RELATIONSHIP ALONE PERMITS THE JURY TO MAKE THE INFERENCE THAT A WIFE KNOWS ABOUT THE INSURANCE HER HUSBAND CARRIES.

The court admitted evidence of the existence of a life insurance policy on the deceased which named the Petitioner as beneficiary. The acquisition of the insurance proceeds was the alleged motive for the murder. The Petitioner unsuccessfully objected that due process required, that the prosecution produce some proof that the wife knew of the policy's existence prior to the murder, before the evidence could be admitted. This proposition is consistent with Pennsylvania law with respect to the use of insurance proceeds as

evidence of motive for murder and the criminal standard of knowing, intentional conduct. Commonwealth v. Boden, 399 Pa. 298, 159 A. 2d 894 (1960); Commonwealth v. Giacobbe, 341 Pa. 187, 19 A. 2d 71 (1941).

Under Pennsylvania law the prosecution is never required to prove motive as an element of a crime. But, it must do so by competent evidence should it elect to prove motive. Commonwealth v. Shain, 493 Pa. 360, 426 A.2d 589 (1981).

To carry its burden of proving that the accused knew of the existence of the policy prior to the murder, the prosecution offered only two facts: 1.) the existence of the marital relationship between the accused and the deceased, and 2.) the payment of the proceeds of an insurance policy on the life of the deceased to the accused.

Without citing any authority for the proposition, and drawing on his own marital

experience, the trial judge held that "reason and experience" demonstrate that the mere status of marriage permits the inference that a wife is fully knowledgeable about her husband's finances. (T.T., pps. 312-313).

Petitioner argued that reason and experience clearly demonstrate no consistent relationship between the status of marriage and the existence of knowledge by one spouse of the other's financial affairs, and thus the jury should not be allowed to know of the payment of the proceeds, given the obvious potential for impermissible prejudice.

The Supreme Court of Pennsylvania has held that identical due process standards apply regardless of whether a challenged inference of fact is authorized by statute or common - law precedents. Commonwealth v. DiFrancesco, 458 Pa. 188, 329 A. 2d 204 (1974).

This Court itself has held that with respect to statutory inferences, due process requires that the inferred fact follow more-likely-than-not from the presumed fact. Turner v. United States, 396 U.S. 398 (1970).

We find it inconceivable that it can be inferrred that a married woman is more likely than not to know of her husband's insurance policies, merely because she is married to him and particularly where as here, the parties were somewhat estranged.

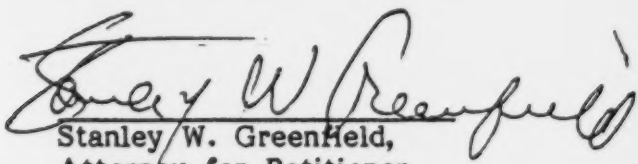
There is no authority in Pennsylvania or elsewhere for that proposition. This evidence as to motive was so patently prejudicial that its admission could never be considered harmless, given the facts of this case. The evidence against the Petitioner was circumstantial, in precisely which type case, motive evidence immeasurably reinforces the prosecution's theory.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania should be granted.

Respectfully submitted,

GREENFIELD & MURTAGH



Stanley W. Greenfield,
Attorney for Petitioner,
Elizabeth J. Heron

CERTIFICATE OF SERVICE

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

I hereby certify that on the 16th day of March, 1987, three (3) true and correct copies of the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, were served on each of the individuals and in the manner indicated below, which service satisfies the requirements of Rule 28 of the United States Supreme Court Rules.

SERVICE BY FIRST CLASS, UNITED STATES MAIL, POSTAGE PREPAID:

Robert Colville, Esquire
District Attorney of Allegheny County
401 Courthouse
Pittsburgh, Pennsylvania 15219

BEST AVAILABLE COPY

GREENFIELD & MURTAGH

Stanley W. Greenfield,
Attorney for Petitioner,
Elizabeth J. Heron

SWORN to and subscribed before me

this 16th day of March, 1987.

Notary Public

My Commission Expires:

JANE C. DINDINGER, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES JUNE 7, 1988
Member, Pennsylvania Association of Notaries

The Supreme Court of Pennsylvania
Western District

Prothonotary
Irma T. Gardner
Deputy Prothonotary

801 City-County Building
Pittsburgh, PA
(412) 565-2816

January 15, 1987

Stanley W. Greenfield, Esquire
Greenfield & Murtagh
728 Fifth Ave.
Pittsburgh, Pa. 15219

In Re: Commonwealth v. Betty Heron, etc.
No. 469 W. D. Allocatur Docket 1986

Dear Mr. Greenfield:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above matter:

"January 9, 1987
Petition Denied.
PER CURIAM"

Very truly yours,

/s/ Irma T. Gardner
DEPUTY PROTHONOTARY

ITG:cho
cc: Robert L. Eberhardt, Esq.
Hon. Robert D. Dauer (Tamilia, J.)

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	
v.	:	NO. 45 PITTSBURGH 1984
BETTY HERON	:	
APPEAL OF: ELIZABETH J. HERON	:	

ORDER

AND NOW, this 4th day of June, 1986, it is ordered as follows:

Judgment of Sentence affirmed.

BY THE COURT

/s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
V.	:	
	:	PITTSBURGH 1984
BETTY HERON	:	
APPEAL OF:	:	NO. 00045
ELIZABETH J. HERON	:	PITTSBURGH 1984

Appeal from the judgment of sentence of December 29, 2983 in the Court of Common Pleas of Allegheny County, Criminal Division, at Nos. CC 8206994 and CC 8207086.

BEFORE: BECK, JOHNSON AND MONTGOMERY, JJ.

PER CURIAM: FILED: JUNE 4, 1986

Judgment of sentence affirmed.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
V.	:	
	:	PITTSBURGH 1984
BETTY HERON	:	
APPEAL OF:	:	NO. 00045
ELIZABETH J. HERON	:	PITTSBURGH 1984

Appeal from the judgment of sentence of December 29, 2983 in the Court of Common Pleas of Allegheny County, Criminal Division, at Nos. CC 8206994 and CC 8207086.

BEFORE: BECK, JOHNSON AND MONTGOMERY, JJ.

MEMORANDUM:

Appellant was found guilty of conspiracy and murder. She was sentenced to life imprisonment. She raises seven (7) issues on this direct appeal. We affirm.

Betty Heron became acquainted with Anthony Ferraro through her job as a sales clerk with a meat wholesaler. Mr. Ferraro ran the cafeteria in the Federal building in Pittsburgh and used to order supplies from Mrs. Heron over the phone. In

time, a friendship was established between the two. As their friendship became stronger, Mrs. Heron began telling Mr. Ferraro about the difficulty she was having in her marriage to David Heron. She described how intolerable her homelife was and how she wished her husband were dead. She asked Mr. Ferraro if he knew someone who would shoot her husband for her or if he would do it himself. At first Mr. Ferraro demurred but eventually he agreed to kill David Heron for the sum of $5,000.00. Mrs. Heron paid him $2,500.00 in cash prior to the job and told him where to find David Heron. On August 5, 1981, Anthony Ferraro followed David Heron from his job to a nearby diner, waited for him in the parking lot, accosted him while he (David Heron) was sitting in the cab of his pick-up truck, and shot him twelve (12) times with two handguns.

Two days after her husband's death, Mrs. Heron paid Ferraro another $900.00 in cash and

$500.00 in the form of a personal check. To make up the remaining $1,100.00, Mrs. Heron later sold her late husband's pick-up truck, valued at $4,600.00, to Ferraro for $3,500.00. Anthony Ferraro was arrested for the first degree murder of David Heron, tried, convicted and sentenced to serve life in prison. He was the principal witness against appellant in the present case.

Appellant's first contention is that a remark made by the District Attorney during closing argument was unduly prejudicial and improper. The remark referred to other bank accounts of appellant's from which the case payments to Ferraro might have been made.

. . . The Commonwealth comes into every Courtroom in every case with that burden. We do so in this case. What [w]e cannot do, however, is answer the unanswerable. I can only send the detectives out and investigate what can be investigated. They can only go and collect the evidence that exists. They cannot get into somebody's mind to bring in evidence. So when Mr. Gondelman, for example, when he says the $2,500.00 in cash. The Commonwealth has no proof from Mrs. Heron's bookkeeping records where the $2,500.00 in cash came from. He is absolutely right, I cannot prove that. I cannot do that. I have no evidence to give you where the $2,500.00 came from because the only place I can go to lok at is from the backs of the checks which we had and we only had the one bank. We only have the one account but where else can you go to gather the evidence. I guess the point is when the Commonwealth has to prove its case beyond a reasonable doubt, keep in mind about what type of evidence that exists when the Commonwealth goes to get the evidence. The only thing I can do is Betty Heron takes the stand, I say to her that we have subpoenaed the bank records: Do you have any other bank accounts? And low and behold she says she has one at Parkvale Savings. We don't have the bank records for

Parkvale Savings. You have to know it exists before you can search it.

N.T., Closings, 71-72 (emphasis added).

Following District Attorney Lees' last comment, a side bar conference was held at which appellant's trial attorney stated that the Commonwealth had been aware of appellant's Parkvale account since the coroner's inquest and that the implication of a secret bank account was improper. Appellant did not, however, move for a mistrial. The District Attorney continued his closing as follows:

* * *

MR. LEES (for the Commonwealth): Ladies and gentlemen of the jury, so you know the area of dispute between Mr. Gondelman and myself, is whether or not we knew about the existence of a bank account. In all fairness to Mr. Gondelman, Mrs. Heron did testify about an account at Parkvale Savings. It is our position — it is the Commonwealth's position that we need a bank account number. The only bank account number we had for Mrs. Heron was the bank account that

> was on the check. Mr. Gondelman knows that. He cannot dispute that fact. That is the one we had subpoenaed by the number and that is the only one that we subpoenaed by number. The only point I am trying to make is that you cannot know where the $2,500 came from. The only point I am trying to make is that the only account number we had was the number she had on the bank check which we brought in the record. That is simply the point, if I misled you, I misled you, I apologize. The only bank account we subpoenaed was the one that we had the number on. That is all we can subpoena.

Id. at 76-77.

The applicable law on prosecutorial misconduct was condenced (sic) in Commonwealth v. Youngkin, 285 Pa. Super. 417, 427 A.2d 1356 (1981).

It has often observed that the prosecuting attorney in a criminal case occupies a peculiarly sensitive position as both an officer of the court seeking justice and as a[n] agent of the state attempting to assure effective law enforcement. Commonwealth v. Starks, 479 Pa. 51, 387 A.2d 829 (1978); Commonwealth v. Collins, 462 Pa. 495, 341 A.2d 492 (1975); Commonwealth v. Guess, 266 Pa. Super. 359, 404 A.2d 1330 (1979). In recognizing this singular staton and the influence it might exert on the jury, the appellate courts of this Commonwealth have been careful to scrutinize the trial transcript for prosecutorial comments prejudicial to an accused. Nevertheless, we have always recognized that not every intemperate or uncalled for remark by the prosecutor requires a new trial. Commonwealth v. Jarvis, 482 Pa. 598, 394 A.2d 483 (1978); Commonwealth v. Perkins, 473 Pa. 116, 373 A.2d 1076 (1977). Rather, "[t]he language must be such that its 'unavoidable effect would be to prejudice the jury forming in their minds fixed bias and hostility toward the defendant, so that they could not weigh the evidence and render a true verdict.'" Commonwealth v. Stolzfus, 462 Pa. 43, 61, 337 A.2d 873, 882 (1975), quoting Commonwealth v. Simon, 432 Pa. 386, 394, 248 A.2d 289, 292 (1968). Moreover, the effect of such remarks is largely dependent upon the

> atmosphere at trial, Commonwealth v. Mikesell, 475 Pa. 589, 381 A.2d 430 (1977); Commonwealth v. Dickerson, 406 Pa. 102, 176 A.2d 421 (1962); Commonwealth v. Reynolds, 254 Pa. Super. 454, 386 A.2d 37 (1978), and the proper action to be taken, upon objection, is within the discretion of the trial court. Commonwealth v. Jarvis, supra; Commonwealth v. Stolzfus, supra; Commonwealth v. Silvis, 445 Pa. 235, 284 A.2d 740 (1971). Finally, when the cumulative effect of any improper remarks so prejudices the jury as to prevent a fair trial, reversible error exists. Commonwealth v. Simon, supra; Commonwealth v. Reynolds, supra.

Id. at ____, 427 A.2d at 1362.

Our review of the record indicates that the jurors could not have been so prejudiced by this one remark as to have been unable to render a true verdict. The jury was aware that appellant had other accounts than her checking account from her own testimony on cross-examination.

> Q: Mrs. Heron, did you ever have any other account, other than the one we talked about here?
> A: Did I . . . I had a passbook savings account, I mean a Certificate at Parkvale.

N.T., 551. The District Attorney only drew to the attention of the jury an inference from the evidence that they were able to make for themselves.

Appellant suggests as a sub-issue that the District Attorney misstated the law when he said that he could not subpoena the Parkvale Savings account because he did not know the account number. The trial court held that this statement at most constituted harmless error. See Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155 (1978). We agree. As the Court in Story stated, "although the accused is entitled to a fair trial, he is not entitled to a perfect one." Id. at ____, 383 A.2d at 164.

Appellant's second contention is that the court erred by admitting evidence of the amount of David

Heron's life insurance without first establishing that appellant knew of the existence of that policy. Appellant cites Commonwealth v. Boden, 399 Pa. 298, 159 A.2d 844, cert. denied, 364 U.S. 846 (1960), wherein the Court held that statements made by the defendant regarding the insurance money he would receive when his wife died were admissible to show motive. From this holding appellant suggest (sic) that it is necessary that the Commonwealth establish that the defendant knew of the policy before it can properly be admitted. Appellant's argument is unpersuasive. We see no need to expand the holding in Boden to limit the admissibility of relevant evidence merely because there is no evidence showing that the defendant knew that he or she would profit from his or her crime. Indeed, in Commonwealth v. Riley, 458 Pa. 390, 326 A.2d 384 (91974) (sic), the Court held that existence of an insurance policy on defendant's

wife's life was admissible to show motive. That opinion does not state that the Commonwealth proved that defendant knew he would benefit from the policy nor will we read in such a requirement. We therefore hold that the trial court did not err by allowing David Heron's insurance policy to be admitted into evidence without first requiring the Commonwealth to prove that appellant knew that she was the beneficiary of that policy.

Appellant's third contention is that the trial court erred by refusing to allow testimony of appellant's one prior consistent statement. The statement in question was made to Sidney Baker, Esquire, appellant's prior counsel who was handling appellant's divorce prior to her husband's demise. Appellant avers that Mr. Baker would have testified that she told him that she had given Anthony Ferraro a check for $500.00 in payment for work on her driveway which he was to have done. This

would corroberate her defense that the $500.00 payment to Mr. Ferraro was for a driveway and not for a murder. The statement allegedly was made sometime prior to appellant's arrest but after the arrest of Anthony Ferraro. The Commonwealth contends that the statement was a recent fabrication intended to bolster appellant's credibility. The trial court ruled that the statement was a self-serving declaration and not a prior consonant statement. The statement was therefore deemed inadmissible.

Prior consonant statements are admissible if used in rebuttal to attacks upon the credibility of a witness and if made prior to a time at which the witness could have forseen the need in the future to rely upon a fabrication made at that time. Keefer v. Byers, 398 Pa. 447, 159 A.2d 477 (1960).

The first part of the two part test is that the witness' testimony is challenged as a

fabrication. Clearly the prosecutor's cross-examination of Mrs. Heron, running more than 150 pages of testimony, cast sufficient doubt upon her direct testimony to warrant rehabilitation. Thus, the first part of the test was satisfied.

The second part of our analysis has been consistently treated by the courts of Pennsylvania. "[C]onsonant declarations may be given . . . to show that the same statement was made before its ultimate effect on the question trying could have been forseen". . . . Keefer, supra (emphasis added). "Evidence of consonant statements, if admissible, are admissible only in rebuttal and then only for the purpose of showing that that which the witness now testifies to has not been recently fabricated and not for the purpose of proving the truth of the present testimony." Commonwealth v. Wilson, 394 Pa. 588, 148 A.2d 234 (1959). Our question in regard to the second part of the test is: at what

point in time does the probability that a prior statement was made in anticipation of judicial inquiry preclude its admission? Appellant stresses that the statement was made before her own arrest; the Commonwealth emphasizes that it was made after Ferraro's arrest, at a time when, to quote the trial court, appellant "could reasonable (sic) assume she was or would be a suspect." Dean McCormick provides the following additional guidance:

> [I]f in the particular situation, the attack by inconsistent statement is accompanied by, or interpretable as, a charge of a plan or contrivance to give false testimony, then proof of a prior consistent statement before the plan or contrivance was formed, tends strongly to disprove that the testimony was the result of a contrivance.

McCormick, On Evidence 106 (1972 2d ed.) (emphasis in original).

We cannot tell when Mrs. Heron first decided to claim that the $500.00 check was given to

Ferraro for work on the driveway. Perhaps she knew when she wrote it that at some time in the future she would need an alternative explanation for writing such a check. Perhaps she thought of it when her husband was murdered. As the trial court found, however, she certainly knew of the need for an explanation for that check when Anthony Ferraro was arrested. Because the statement was made after Ferraro's arrest, it came after a time when the ultimate effect of the statement on her forthcoming criminal trial could have been forseen. The trial court did not err by ruling that the statement allegedly made to Attorney Baker was not a prior consonant statement.

Appellant's fourth assignment of error is that the court should not have allowed appellant's bank records to have been admitted. The records in question spanned the period from December 1979

through April 1982. The records were introduced by the Commonwealth to show that appellant was able to finance the murder; specifically that she could have raised the $2,500.00 paid to Ferraro prior to August 5, 1981. Appellant contends that the records were irrelevant because they showed no more than ordinary deposits made coinciding with her paychecks and withdrawals made consistent with household expenditures. In addition appellant claims that she was prejudiced by admission of the records because they showed that she retained current counsel far in advance of her arrest. For these reasons, appellant maintains that the records' probative value was outweighed by the likelihood that they would unduly prejudice her and thus that they should not have been admitted.

In reviewing questions of the admissibility of evidence, our standard is well established.

> Appellant, in challenging the exercise of discretion by the trial court bears a heavy burden. The standard which must be met is a stringent one. "The abuse of discretion is not merely an error in judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by the evidence on the record, discretion is abused." Commonwealth v. Braithwaite, 253 Pa. Superior Ct. 447, 385 A.2d 423 (1978).

Commonwealth v. Cullen, 340 Pa. Super. 223, 489 A.2d 929, 935 (1985). And see U.S. ex rel. Marcus v. Hess, 41 F. Supp. 197, rev'd 127 F.2d 233, rev'd 317 U.S. 536, 63 S.Ct. 379, 87 L.Ed. 443 (D.C.Pa. 1941) (the law permits great latitude in the admission of circumstantial evidence tending to establish a conspiracy, and the limits to which such evidence may be admitted to establish existence of conspiracy rest in sound discretion of trial court, and its ruling will be sustained if evidence which

is admitted tends even remotely to establish the ultimate fact.).

Having reviewed the record on this point, we cannot state that appellant has satisfied the heavy burden outlined above. The trial court did not abuse its discretion by allowing evidence which helped to establish that a conspiracy to commit murder for hire was a financial possibility for appellant.

Appellant's fifth contention is that trial counsel's failure to attempt to introduce a certain check stub into evidence constituted constitutionally ineffective assistance of counsel. the (sic) stub from appellant's check book was for that the (sic) $500.00 check to Mr. Ferraro; it was marked "driveway."

Ineffective assistance of counsel allegations are tested with the three step procedure set forth in Commonwealth v. Pierce, ____ Pa. Super. ____,

499 A.2d 423 (1985). To prevail, appellant must show that (1) the issue underlying the ineffectiveness claim has arguable merit, (2) the course chosen by consel (sic) did not have a reasonable basis aimed at advancing appellant's interests, and (3) former counsel's chosen course so prejudiced appellant as to deny her a fair trial.

Assuming arguendo that there is arguable merit for appellant's claim that the stub would have been admitted had trial counsel sought its admission, and thus clearing the first hurdle to ineffectiveness, counsel's tactical decision not to seek introduction of the check stub was reasonable. The fact that the $500.00 check was the Commonwealth's principal piece of corroborating evidence in support of Anthony Ferraro's testimony. More than half of the commonwealth's 150+ page cross-examination of appellant was devoted to questions about the check. To have introduced the

check stub would only have served to focus still greater attention on that $500.00 payment to Ferraro. Any corroborative effect the stub might have been expected to ahve might have been completely nullified by the vigorous battle against its admission counsel for the Commonwealth would have mounted and by the cautionary instruction the court would have given.

> . . . had the check stub been submitted, it is highly unlikely it would have been presented to the jury, for a notation on the stub, which was totally in Betty Heron's control until the date of trial, could have been placed there by her any time before or after her arrest. It did not present the quality of evidence necessary to meet the test of its admission, and had it been admitted, the prosecutor would have been entitled to instructions to consider it with some skepticism.

Trial court opinion at 20.

Counsel's failure to act, where that decision is based upon tactical considerations, does not evidence ineffectiveness. Commonwealth v.

Zimmerman, ____ Pa. Super. ____, ____ A.2d ____ (No. 3470 Philadelphia, 1982, filed February 20, 1986); Commonwealth v. Dancer, 460 Pa. 95, 331 A.2d 435 (1975). Here, counsel was not ineffective for not seeking the introduction of a check stub for tactical reasons.

Appellant's last two issues on appeal concern the prosecution proneness of "death qualified" juries. Specifically, appellant contends that a death qualified jury is violative of her sixth amendment right to an impartial jury and that the court abused its discretion by allowing the prosecution to challenge jurors who would be unable to sentence appellant to death if she were found guilty without first requiring the Commonwealth to show that this was a capital case. The first issue has not been properly presented to this court on the record. The second issue is frivolous.

To establish whether there is such a thing as a guilt prone jury, appellant must present evidence of record. Commonwealth v. Szuchon, 506 Pa. 228, 484 A.2d 1365 (1984); Commonwealth v. Story, ____ Pa. ____, 440 A.2d 488, 496 (1981) (Justice Larsen, Dissenting). In Szuchon the court refused to take judicial notice of studies performed on the subject. We are presented with an analogous situation here. Appellant, by stipulation, has made a number of studies part of the record. Appellant also had the opportunity to present expert testimony at an evidentiary hearing. Appellant failed to do so. If we decide this important issue on the basis of the stipulated to articles, we will in effect be forced to take judicial notice of articles voicing an opposing point of view. In addition, because appellant did not present evidence at an adversarial proceeding, we are unable to review the opinions of the various authors subject to cross examination.

The importance of testimonial as well as documentary evidence has been recognized by C.J. Nix in his dissent in Commonwealth v. Simon, (No. 82 W.D. Misc. Docket 1985). In Simon, the Commonwealth petitioned for extraordinary relief to the Pa. S.Ct. following the trial court's ruling that death qualification challenges would count against the Commonwealth's peremptory challenges. The defendant also appealed, challenging the constitutionality of death qualified juries. The Pennsylvania Supreme Court reversed the trial court and remanded without treating the death qualification issue. Chief Justice Nix and Justice Zappala would have reached the death qualification issue on the record before them. As Chief Justice Nix stated, "Unlike prior cases in which the death-qualification issue has been raised, the instant matter presents a full evidentiary record including

both empirical studies and expert testimony." Id. at 2 (emphasis added, citations omitted).

As the record before this court lacks expert testimony, it is not a full evidentiary record. We cannot properly decide an issue of such importance on the basis of an insufficient record.*

Appellant's final contention, that the Commonwealth must make a prima facie case for the capital offense before death qualification challenges will be permitted, is fatuous. See Commonwealth v. Tomony, 488 Pa. 324, 412 A.2d 531 (1980); Commonwealth ex rel. Fitzpatrick v. Bullock, 471 Pa. 292, 370 A.2d 309 (1977).

Judgment of sentence affirmed.

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* See Lockhart v. McCree, 54 U.S.L. 4449 (1986).

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY,
PENNSYLVANIA

CRIMINAL DIVISION

OPINION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	CC #8207086
	:	CC #8206984
HERON, Betty	:	

Honorable Patrick R. Tamilia

OPINION

Tamilia, J.

On August 23, 1982, an arrest warrant and criminal complaint were issued charging Betty Heron with accomplice, Anthony Ferraro, in the contract killing of David Heron, the defendant's husband.

She was brought to trial on January 17, 1983, and on January 22, 1983, the jury found defendant guilty of murder of the first degree and conspiracy. Anthony Ferraro was tried separately and was convicted of murder in the first degree and sentenced to life imprisonment.

Pursuant to the bifurcated procedures mandated by the Sentencing Code, 42 Pa.C.S.A. §9711, a separate sentencing hearing was immediately conducted at which time the jury determined that Mrs. Heron should be sentenced to life imprisonment. Trial counsel filed motions

alleging the insufficiency of the evidence, the verdict being against the weight of the evidence and certain trial errors. Prior to argument, new counsel entered the case to pusue the appellate procedures.

Following argument and consideration of the briefs, the post-verdict motions were denied. A life sentence was imposed and sentence on the conspiracy verdict was suspended on December 29, 1983. Notice of appeal was filed January 6, 1984.

Pursuant to Pa.R.Crim.P. 1925(a), this Opinion has been prepared providing the reasons for the Court's rulings and/or other matters complained of.

In reviewing this case, the standard for determining the sufficiency of the evidence has been stated as follows:

> In reviewing the sufficiency of the evidence, we must view the evidence presented and all reasonable inferences taken therefrom in the light most favorable to the Commonwealth, as verdict winner. The test is whether the evidence, thus viewed, is sufficient to prove guilt beyond a reasonable doubt. Commonwealth v. Madison, 501 Pa. 485, ___, 462 A.2d 228, 231 (1983); Commonwealth v. Shaver, 501 Pa. 167, ___, 460 A.2d 742, 743 (1983); Commonwealth v. Sample, ____ Pa. Supeer. ____, ___, 468 A.2d 799, 801 (1983); Commonwealth v. Curry, ____ Pa. Super. ____, ____, 465 A. 2d 660, 662 (1983). The credibility of witnesses and the weight to be accorded the province of the trier of fact; the fact finder is free to believe all, some, or none of the evidence. (Citations omitted)

Commonwealth v. Taylor, ____ Pa. Super. ____, 471 A.2d 1228 (1984). We believe the evidence is sufficient in law to sustain the verdict, and the weight appropriately given the evidence by the jury established defendant's guilt beyond a reasonable doubt.

FACTS

On August 5, 1981, between 3:00 and 3:30 p.m. Mr. David Heron was shot to death while sitting in the driver's seat of his truck in the parking lot of the Wind Chimes Restaurant on Neville Island on the Ohio River downstream from Pittsburgh, Pennsylvania

A waitress, Mundee Henderson, heard shots and upon going to the window, witnessed a man jabbing a revolver into the driver's side of the pickup truck in staccato rhythm with the firing of the gun (T.T. p. 15). Subsequently, from a photo array and a lineup Henderson identified the person she saw shoot David Heron, that person being Anthony Ferraro (T.T. p. 27). The other witness to the shooting was Marsha Hendricks, who testified in a similar fashion.

Anthony Ferraro testified that at the time of the shooting, he was the manager of the cafeteria

in the Federal Building in Pittsburgh with a salary of $24,500 (T.T. p. 48-49). He admitted killing David Heron by shooting him twelve times, using two guns (T.T. p. 50). In March of 1982 at his own trial, he denied any involvement in the killing of David Heron in order to beat the charge (T.T. p. 52). He was convicted of murder, and subsequently, during testimony before a grand jury, he decided to tell the truth admitting his actions as the shooter and implicating Betty Heron as his accomplice (T.T. p. 54). He identified Betty Heron in the courtroom following testimony on the above.

Anthony was with Betty Heron about twenty times prior to the shooting. He first met her at Christmas time in 1979 as she was a salesperson for a meat company and he had invited her to the cafeteria to discuss business. They had become friends on the phone. In 1981, he saw her at her employer's Deaktor Meats, Christmas part. They

saw each other more frequently thereafter until the shooting in August of 1981, but not on a romantic basis. They met at one another's homes on a couple of occasions and had drinks together. It was during these contacts he first learned she was seeking a divorce. She told him her husband beat her and raped her and eventually she had separated from him. During a phone conversation in March of 1981, Betty told Tony that she wanted her husband dead (T.T. p. 63). A few weeks later, she again expressed the wish that he were dead and asked if he knew anyone who would shoot her husband for her (T.T. p. 65). Thereafter, it was mentioned by her just about every time they talked (T.T. p. 66). In the summer of 1981, a matter of weeks before the murder, she asked Tony to kill her husband for her. He told her she was crazy, but she peresisted in subsequent contacts offering him $10,000.00 to do the killing (T.T. p. 69) (sic)

Because of her persistance and his sympathy with her about the mistreatment she alleged to be receiving, he agreed to kill David Heron, but told her $10,000 was too much and they agreed upon $5,000 as the price (T.T. p. 72).

Betty obtained her husband's work schedule at Matlack Trucking for Tony the night before the killing by calling the company (T.T. p. 73). She communicated this to Ferraro the next day, August 5, 1981, when he decided to kill David Heron. On the previous Monday, August 3, she gave Tony $2,500 in cash at his off ice, which he put in the safe. The agreement was to pay one half before the killing and one half afterwards (T.T. pp. 74-75).

As to the weapons, Ferraro had two guns, both .32 caliber revolvers, one was his, the other belonged to a friend who gave it to him to be fixed. Both guns were in working order at the time of the murder.

On the day of the killing, Tony left work at 11:00 a.m. to locate the victim, who, according to Betty Heron, would be at the Matlack Trucking Company at about noon. At Matlack, he waited for David Heron to come back and intended to identify him from a picture given to him by Betty Heron. David arrived about 12:30 p.m., went into the building and later came out getting into his personal truck and driving off (T.T. pp. 78-80). Tony followed the victim to the Wind Chimes Restaurant on Neville Island. David Heron went into the restaurant, Tony parked outside and waited. About five minutes later David came out, whereupon Tony got out of his car and went over to David who was inside his truck and they began talking. At the time, Tony had the two guns with him. He remarked about Betty being upset concerning the use of her name to purchase a mobile home. David got mad and swung a clip board at

Tony; Tony pulled out a gun and shot David six times, and after pulling the other gun, shot him six more times (T.T. pp. 82-83). Tony then went to his car and drove away returning to his place of employment about 4:10 p.m. He called Betty and told her to watch the six o'clock news. Betty called him after the eleven o'clock news confirming that she had seen the report concerning the murder. Friday, August 7, following the murder, Betty went to Tony's office and gave him $900 in cash and a check for $500 toward the balance of the agreed upon $5,000 contract price. The $500 was deposited in his account and he kept the $900 cash. There was $1,100 remaining on the contract price, which by agreement was to be made up by the sale of the truck to Tony by Betty for $3,500, resulting in a cancellation of the $1,100 debt (the truck being worth $4,600) (T.T. p. 89). The truck was paid for by a check for $3,500 in September of 1981 (T.T.

p. 89). The $500 check made out to Betty to Tony dated August 10, 1981 was also introduced into evidence (T.T. p. 91).

As to the truck, Betty asked Tony to recover it from the Neville Island police. He did so by giving a false name, Robert Reno, which was suggested to him by Betty. He took the truck to his house and later sold it for $4,587 to a Steve Martin, who was the assistant manager at the Federal Building. He sold the truck and received a check just days before his arrest on October 14, 1981. Tony denied any deal for a plea bargain but acknowledged that he was testifying under an order of immunity.

Testimony was received from Chief Edward Selzer on Neville Island (T.T. p. 214) who stated Mrs. Heron came to the Neville Island station to pick up the truck and boat on August 26 with a male who identified himself as Robert Reno. He

thought Robert Reno fit the description of the killer. The man who identified himself as Reno, he identified in the courtroom as Anthony Ferraro. The chief stated he was willing to pay $4,500 for the truck which he stated was in good condition (T.T. p. 220). An expert named Michael Ord testified later that the truck had a value of $4,800 to $5,000 wholesale and a $6,000 retail price.

Other evidence presented by the Commonwealth was relevant to the overall circumstances of this case. Betty's employer, Charles Deaktor, testified that Betty Heron was paid $13,000 a year. Bank records of Anthony Ferraro between December 8, 1979 and April 9, 1982 were admitted. Heron's records were also admitted and in both situations the intent of the Commonwealth was to establish relevant deposits and withdrawals having a relationship to this case. Heron's bank records showed a deposit of $2,050

made in July, one month prior to the killing of her husband; there is also the evidence of the single check of $500 made to Anthony Ferraro.

The testimony of Howard Taylor, a Matlack employer, was to the effect that on August 4, 1981 he received a call from a female regarding the work hours of David Heron for the following day, that is August 5. This call was received on August 4 between 6:00 and 11:30 p.m.

Ellen Klein, an evidence clerk for the district attorney's office in the Allegheny County Investigating Grand Jury, had compiled a record of deposits and withdrawals on both the accounts of Betty Heron and Anthony Ferraro. It was shown that a check for $3,500 made payable to Betty Heron from Anthony Ferraro, which confirms his purchase of the truck and, likewise, the check for $500 made from Betty Heron to Anthony Ferraro was listed in this compilation.

Charles Salvatore, an official of the Teamsters Union, testified that David Heron was covered by $20,000 life insurance with a double indemnity feature. Betty Heron was the beneficiary of this policy and $40,000 was paid to her upon David's death. She also received $5,000 from the welfare fund. The total receipt through the Union and insurance including interest was $46,108.06. He also testified that when a contract is negotiated, each Teamster gets a copy of the booklet concerning its terms which would include the insurance policy.

In her defense, Betty Heron testified that when her husband, David, drank, he physically abused her. In March of 1981, she went to Sydney (sic) Baker, an attorney, to start divorce proceedings. Everything seemed to be in order, but then on July 27, 1981, shortly thereafter, she received a letter from Baker indicating that David

was going to cause trouble including making a claim against the house bought with money she had received as a settlement from her first husband. She claims she was not upset by this. As to her relationship with Ferraro, Betty testified that she had contact with him a total of seven times prior to the killing. In relation to the check given to Ferraro in August in the amount of $500, she stated this check was for the purpose of paying for driveway work to be arranged by Ferraro with the Crisella Construction Company T.T. p. 475). Eventually she paid Crisella $300 in November of 1981 at the suggestion of Ferraro. She acknowledged accepting $3,500 from Ferraro for the truck but expected him to pay the additional $1,100 as the agreed value of the truck was $4,600 (T.T. p. 490). Betty testified she might have called about the time of the August 4th call to Mr.

Salvatore to talk to David concerning the medical card which she needed (T.T. p. 505).

On cross-examination, she appeared very uncertain, inconsistent and waivering as to the check for $500 paid to Ferraro. It was subsequently established on the record by Crisella Construction Company that the driveway was actually paved on September 18, 1981. There was no contact between Crisella and Ferraro concerning payment. All contacts relating to payment and extent of the work to be done were communicated between Crisella and Betty Heron (T.T. p. 862 by Americo Crisella). Crisella testified that he talked about the work to be done on the driveway with Betty within a week or two prior to the actual work being commenced. The following day he called her to tell her the job was completed. At that time she said that she would mail a check to him. Mr. Crisella said he did not get a check and after a

couple of weeks passed, he called again and it was mentioned to him that the job was unsatisfactory. And then his son, Ereric, took over to collection. Mr. Crisella said he never discussed payment with Ferraro (T.T. p. 874). Mr. Emeric Crisella stated his work record showed the job was done on September 18 (T.T. p. 878) and from the material slips, material had to be purchased that day because it had to be used within two hours from the time received from the asphalt plant (T.T. p. 879). As to payment, Heron finally paid $300 in November, 1981.

Betty Heron was arrested for the murder of her husband on August 24, 1982.

LEGAL ISSUES

As to pre-trial motions regarding the death penalty, these are dealt with in the order filed January 24, 1983. It is part of the record and the legal authority is herein incorporated by reference.

Motion for New Trial and In Arrest of Judgment

The first five allegations are boilerplate and need not be addressed by this Court. Commonwealth v. Holmes, ____ Pa. Super. ____, 461 A.2d 1268 (1983).

The sixth allegation, "The evidence was insufficient to sustain the verdict of the jury," is totally without merit, as the detailing of the facts above clearly establishes the evidence, if believed by the jury, is more than adequate to establish all of the elements of Criminal Homicide and Conspiracy by Betty Heron in a contract with Anthony Ferraro to kill her husband, David. In furtherance of the conspiracy and pursuant to the contract, David was, in fact, murdered by Anthony Ferraro. This too lacks specificity and is subject to the same limitations imposed by Holmes, supra.

7.) The Court did not err in permitting evidence of the policy on David Heron's life to

which Betty Heron was a beneficiary. Under circumstances such as these, with the wife who is employed and in the business world, with at least average knowledge of employment conditions and benefits (she admits calling her husband's employer about medical benefits), it is fair to assume that out of the confidential relationship, knowledge of insurance policies may be presumed. "Knowledge (of an insurance policy) may be inferred from relationships (father/son)." People v. Doedecke, 56 Cal. Rptr. 625, 423 P.2d 777 (1967). The issue of whether or not the defendant knew of the existence of the policy was an issue to be determined by jury. Whether or not she knew there was a double indemnity aspect to the policy is immaterial to admission of evidence as to the existence of the policy. She did, in fact, receive $46,000 in benefits related to her husband's employment as a result of his death. Obviously the existence of an insurance

policy could be a motive to the killing of Betty, since she could fairly construe herself to be his beneficiary.

8.) Defense counsel maintains a statement to Sidney Baker concerning her payment of $500 should have been permitted to go to the jury as a prior consistent statement. This statement was made to Baker after David's death, and after Anthony Ferraro's arrest, and at a point in time when Betty Heron could reasonably assume she was or would be a suspect (T.T. pp. 890-892). As such, it would have been a self-serving declaration and not qualify for admission as a prior consistent statement. Keefer v. Byers, 398 Pa. 447, 159 A.2d 477 (1960); Commonwealth v. Wilson, 394 Pa. 588, 148 A.2d 234 (1959) cert. denied, 361 U.S. 844, 80 S.Ct. 97, 4 L.Ed. 2d 82 (1959); McCormick on Evidence, 3rd Edition, Sec. 49 p. 118, 75 ALR2d 909, 933. The intent of the exception to the hearsay

rule provided by the consonant statement provision is to rebut evidence harmful to the witness' veracity by consistent statements made prior to any need to falsify. Such is not the case here.

9.) The bank deposits and withdrawals, in total, of both Betty Heron and Anthony Ferraro were admissible for the purpose of showing the pattern of financialo transactions, both customarily engaged in and to illustrate the evidence of other transactions associated with the conspiracy and murder. To admit only fragments of the bank records would have been detrimental to either or both the Commonwealth's and Defense cases. The point by point cross-examination by the defense more than adequately established the routine transactions and accounted for funds that initially were open to question by the Commonwealth (such as the source of $1,400 - IRS refund). It was also relevant for the Commonwealth to show there was

sufficient money to pay for the killing and to show there was unexplained income beyond that received from Betty's only visible means of support, her job with Deaktor.

10.) All of the objections raised in this paragraph are subject to the same findings as in No. 9 above. Income received before and after the killing was relevant, as were withdrawals including monies paid to her attorney as indicating her ability to engage in a contract to kill her husband for the price of $5,000 (or $10,000). Whether or not counsel fees would have been an issue, if this was disclosed during trial, is immaterial to the underlying basis for admission of these records, that is, to establishe income sufficient to pay the contract, and to establish deposits and withdrawals related to the contract.

11.) For the same reason as above, the admission into evidence of the deposits and

expenditures had probative value,a nd while this may have been prejudicial, it was not error.

12.) The conspiracy charge and homicide charge are not identical crimes and the appellate courts have long held the elements of conspiracy are separate and distinct from the crime which forms the basis for the conspiracy. Commonwealth v. Miller, 469 Pa. 24, 364 A.2d 886 (1976). This allegation is without merit.

13.) The evidence as to the bank account at Parkvale came into the trial through the defense admissions at the coroner's inquest. The Prosecutor overlooked this when making his closing statement, alleging it had available only those accounts shown at trial. This was error but not prejudicial. The defense on one hand claims the Commonwealth should not be permitted to show that defendant's bank transactions could be probative of sufficient funds to underwrite a contract killing, and then

admits another account which could bolster further, the Commonwealth contention. The Commonwealth commented in closing argument that this account was unknown to it because it did not have an account number. Over defense objection he modified his statement—as modified there were no further objections by the defense. The comment by the prosecutor concerning this account was within the bounds of reasonable argument. In light of the overwhelming evidence in this case, the error, if any, was harmless beyond a reasonable doubt and this Court feels it had no bearing on the jury's verdict.

14.) The arguments relating to the district attorney making out a death case in jury selection are without merit and are dealt with in the Order of this Court in regard to pre-trial motions, dated January 24, 1983, as incorporated here by reference as included in the original record on appeal.

Defendant's major argument in its Supplemental Brief in Support of Motion for New Trial and in Arrest of Judgment, at VII, was that defendant was denied her right to a fair and impartial jury as a result of the voir dire in the instant case. There is no allegation that the Commonwealth failed to proceed in complete compliance with Witherspoon v. Illinois, 393 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968), or the Pennsylvania Rules for qualifying a jury for a capital case and the standard of review established by Commonwealth v. Zettlemoyer, ____ Pa. ____, 454 A.2d 937 (1982). The argument is based on the review of evidence and studies relating to the issue of guilt proneness resulting from the death qualification process presented by Grigsby v. Mabry, 569 F.Supp. 1773 (1983). It is not necessary to analyze the Grigsby arguments as to "fair cross section of the community" or "guilt proneness" or to consider the recommendation of a bifurcated

trial to decide the guilt and sentencing aspects of the case. Suffice it to say that Grigsby is a Federal decision from a district court in Arkansas and subject to the review process of the 8th Circuit Court of Appeals and the United States Supreme Court. Several cases have reached the United States Supreme Court on Stays of Execution where the stay has been denied with the vigarious dissents referring favorably to Grigsby. Woodward v. Hutchins, 104 S.Ct. 752, 78 L.Ed. 2d 541, 52 U.S.L.W. 3532 (1984) and Rector v. Arkansas, 104 S.Ct. 2370, 8 L.Ed. 2d 842, 52 U.S.L.W. 3826 (1984). Also, in view of the fact the jury returned a sentence of life imprisonment, rather than the death penalty, the exclusion of jurors opposed to capital punishment was not reversible error under those circumstances. Bumper v. North Carolina, 391 U.S. 543, 20 L.Ed. 2d 797, 88 S.Ct. 1788 (1968). Recently, the Pennsylvania Supreme Court upheld

the death penalty in Commonwealth v. Stoyko, J-80-83, Western District Appeal Docket, (filed April 18, 1984) and it is certain that these or equivalent arguments were known to that Court, because of the practice, at least in Allegheny County, to make them in every first degree murder case. Under this state of the law, the trial court may not make or change the law without inviting immediate reversal. While defense counsel has preserved the issue for appeal, our mandate is to deny the motion.

14. a.) The Court's recollection of the time it took to return a verdict is no less than 15 to 20 minutes. Defense counsel alleges it was no more than five minutes. The Court takes judicial notice that the jury room was a half city block away on the fifth floor of the Allegheny County Court House. The time it would take to walk to the jury room, to permit

the jurors to get settled, discuss their decision, record it, inform the tipstaff they reached the decision, thereafter, for the tipstaff to return to the chambers to inform the Court, for the Court to determine if the attorneys and defendant were present, a clerk and court reporter available and for the tipstaff to return the jury to the courtroom,—could not have been accomplished in less than five minutes. Irrespective of the time it took to decide between a life sentence and the death penalty, no inference can properly follow that because the jury was death qualified it came in with a guilty verdict.

The Commonwealth relied on the trial record (T.T. 940) and the jury was directed to consider that record as to aggravating circumstances (a

single one — the contract for murder). Mr. Gondleman (sic) presented the testimony in the record of Heron's children, her father, (and introduced her mother), who testified to her good character and exemplary life. This was not a surprise verdict and clearly is accounted for by the exercise of mercy powers inherent in the jury system.

"[T]he length of the deliberation of a jury is wisely left to the sound discretion of the trial Judge, and we reverse only if we find . . . abuse of discretion, or that the verdict was the product of coercion or of an overworked and fatigued jury." (citations omitted) Commonwealth v. Gartner, 475 Pa. 512, 381 A.2d 114, 124 (1977). Accord, Commonwealth v. Penn, 497 Pa. 232, 439 A.2d 1154 (1982). While this rule generally applies when the trial judge holds the jury for a long period, it

applies equally to shorter deliberations involving mistrials, or as here, a rapid return of a verdict.

SUPPLEMENTAL MOTIONS

16.) The testimony of Howard Taylor was properly admissible to corroborate Anthony Ferraro's testimony that Betty Heron had called on August 4, 1981, to determine David Heron's working hours the following day. The testimony of Howard Taylor was that a woman had called regarding David Heron's working hours. While she could not be identified as Betty Heron, the call was a relevant piece of circumstantial evidence, which tied in directly with the testimony of Anthony Ferraro, tending to corroborate his. It was not admitted for the purpose of identifying Betty Heron. She further corroborated calling the company about that time in order to talk to David about his medical card. It was up to the jury as to what weight or value they would place on that testimony.

17.) The claim of ineffectiveness of counsel, the last in these motions, and the last defense of desperate counsel is totally without merit. Trial counsel objected to the admission of the bank records throughout. The records were admitted and regardless of the check made out to Mr. Gondelman as part of those records, the Court believes they were relevant and admissible for the purposes stated above. The fact that his check was included is immaterial and it is assumed he knew at the time of presentment that he had been paid $5,000 by Betty Heron in November 1981, almost a year before her arrest. The following testimony elicited by Mr. Gondleman (sic) from witness, Sidney Baker, established he was representing Heron in the criminal matter independent of evidence from the check and before the jury saw his check. At T.T. p. 816:

GONDLEMAN (sic): Q. Now, Mr. Baker, in connection with this matter did there come a time when it appeared that there were criminal matters with which Betty Heron required advice?

A. Yes, when Anthony Ferraro was arrested.

. . . . .

Q. Mr. Baker, did Mrs. Heron advise you that she had retained the services of Harold Gondleman (sic) to represent her?

A. At some point, I think around the first of December (1981) somewhere around there.

Q. Did you turn over her entire file, basically the estate file to me to represent her?

A. I turned over—I think I gave you copies of everything I had in my file.

Likewise, at T.T. pp. 872-83, cross-examination of Americo Crisella:

Q. I'm sorry Mr. Crisella, when my investigator went to see you, that was December 16, of 1981, not 1982 that I said before, it was over a year ago, not last December, not last month. My investigator came out to see you in December of 1981, do you remember that?

These two series of questions by Mr. Gondleman (sic) (and others) established unequivocally that Mrs. Heron had employed him

as a criminal lawyer to represent her in matters relating to Mr. Ferraro's arrest and her husband's murder, long before Ferraro became a state witness and before Heron was a suspect.

It can be fairly assumed that such an astute trial lawyer as Mr. Gondleman (sic) attempted to keep the entire record out because he knew a record of the check to him was included, and failing that, hoping to luck out by not calling it to the Court's, prosecutor's, or jury's attention, thereby avoiding the discovery because of the possible adverse effect. This is trial strategy at its best, and to be expected of this counsel. We note the affidavit by Mr. Gondelman as to his own ineffectiveness and we condemn it. Since we have commented on this issue above, any further comment is unnecessary.

As to item "B", failure to introduce a check stub to the $500 check written by Mrs. Heron to

Anthony Ferraro, any comment in view of our discussion above is redundant, particularly since had the check stub been submitted, it is highly unlikely it would have been presented to the jury, for a notation on the stub, which was totally in Betty Heron's control until the date of trial, could have been placed there by her any time before or after her arrest. It did not present the quality of evidence necessary to meet the test of its admission, and had it been admitted, the prosecutor would have been entitled to instructions to consider it with some skepticism.

Defendant's Motion for Evidentiary Hearing was denied as it was directed toward proof of ineffectiveness of counsel on the above issues, which are clearly refuted by the record, and on the issue of guilt prone jury selection, which has been discussed above. There is no basis to set aside the verdict of the jury or to grant a new

trial and the judgment of sentence should be affirmed.

/s/ Tamilia, J.

September 19, 1984